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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MIKE EARL MITCHELL,

Defendant and Appellant.

D057055

(Super. Ct. No. SCD 211954)

APPEAL from a judgment of the Superior Court of San Diego County, Kerry Wells, Judge. Affirmed as modified.

I.

INTRODUCTION

Appellant Mike Earl Mitchell appeals from a judgment of conviction after a jury trial. On appeal, Mitchell contends that the record "does not demonstrate that appellant knowingly and intelligently waived counsel at the time of his arraignment on the amended complaint or thereafter." (Formatting omitted.) Mitchell also contends that

even if he effectively waived his right to counsel, the trial court erred in denying his request for advisory counsel. Finally, Mitchell contends that the trial court erred in staying, rather than striking, an enhancement for Mitchell's prison prior offense, an offense on which the trial court relied to impose a separate consecutive five-year enhancement sentence.

We conclude that Mitchell waived his right to counsel, and that the trial court did not err in denying his motion to appoint advisory counsel. With respect to Mitchell's contention concerning the court's staying, rather than striking, the one-year prior prison enhancement, the People concede that the trial court should have stricken, rather than stayed, the enhancement. We agree that the court should have stricken the enhancement. We therefore modify the judgment to reflect the striking of the one-year prison prior enhancement. We remand the matter for the trial court to enter a new abstract of judgment reflecting this modification, and affirm the judgment in all other respects.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*¹

At approximately 7:30 p.m. on February 18, 2008, Viola Contreras got off a bus in North Park and walked to the crosswalk at a nearby intersection to cross the street.

¹ Because Mitchell's appeal involves challenges to procedural matters that occurred prior to his jury trial and at sentencing, we provide only a limited description of the circumstances underlying Mitchell's offenses.

Mitchell approached Contreras, waving a knife.² Mitchell pointed the knife at Contreras and said, "You're dead." He then thrust the knife at Contreras's stomach. Contreras stepped backward to avoid being stabbed. Mitchell then appeared to sharpen his knife on a nearby wall and again thrust the knife toward Contreras.

Another person came to Contreras's assistance by scaring off Mitchell. Mitchell ran down the street, and Contreras called 911 from her cell phone.

San Diego Police Sergeant Richard Fox responded to the scene. After locating Mitchell, Sergeant Fox pulled his patrol car in front of Mitchell and activated his overhead police lights. Sergeant Fox got out of the patrol car and ordered Mitchell to stop and show his hands. Mitchell did not comply with Sergeant Fox's commands, and instead kept his hands hidden under a poncho. Mitchell started walking toward Sergeant Fox. Sergeant Fox repeatedly directed Mitchell to stop, but Mitchell refused to stop. Sergeant Fox had drawn his weapon. At some point, he put his gun away and instead drew a taser gun.

Sergeant Fox continued to order Mitchell to stop, but Mitchell kept walking toward Fox. Sergeant Fox fired the taser gun and Mitchell was hit by the taser barbs. He pulled his hands out of his poncho and dropped a yellow box cutter, with its blade extended, onto the ground.

² Although Contreras described the weapon as a knife, another witness described seeing Mitchell in possession of a box cutter.

When Sergeant Fox threatened to use the taser gun again, Mitchell complied with Sergeant Fox's commands by getting down on the ground and putting his hands behind his head. Mitchell was then taken into custody.

At a curbside lineup, Contreras identified Mitchell as the person who had threatened her with a weapon.

B. *Procedural background*

The San Diego District Attorney filed an information against Mitchell charging him with one count of making a criminal threat (Pen. Code, § 422, count 1)³; one count of assault with a deadly weapon (§ 245, subd. (a)(1), count 2); and one count of resisting a peace officer (§ 148, subd. (a), count 3). With respect to count 1, the information alleged that Mitchell personally used a knife in committing the offense (§ 12022, subd. (b)(1)).

The information also alleged that Mitchell had previously suffered a conviction for a serious felony (§§ 667, subd. (a)(1); 668; 1192.7), a strike conviction (§§ 667, subd. (b)–(i); 1170.12; 668), and a prison prior (§ 667.5, subd. (b)).

On March 21, 2008, the trial court⁴ granted Mitchell's request to represent himself.

³ Further statutory references are to the Penal Code unless otherwise indicated.

⁴ A number of different judges presided over the various proceedings in this case. In the following sections, we will refer to the judges by name in order to make it clear which judge was presiding over the relevant proceedings.

On May 29, 2008, the trial court suspended the proceedings pursuant to section 1368 in order to permit the court to have Mitchell evaluated to determine whether he was mentally competent to stand trial. On June 27, 2008, the court determined that Mitchell was not competent to stand trial and ordered him committed to Patton State Hospital. After receiving a report from Mitchell's doctor that Mitchell was competent, the court found Mitchell competent to stand trial on November 24, 2008.

On February 23, 2009, the trial court again ordered that Mitchell be evaluated to determine his mental competence. The court found Mitchell competent to stand trial on June 10, 2009.

On September 2, 2009, the trial court ordered Mitchell to be evaluated by two doctors to determine his competency to represent himself, pursuant to the Supreme Court's holding in *Indiana v. Edwards* (2008) 554 U.S. 164 (*Edwards*). After receiving and considering these evaluations, the court determined that Mitchell was competent to represent himself.

A number of different judges held multiple status conferences in October 2009. Trial commenced on December 1, 2009. Two days later, the jury found Mitchell guilty on all counts, and also found true the allegation that Mitchell personally used a knife in committing the offense of making a criminal threat as alleged in count 1.

After the jury returned its verdicts, the trial court conducted separate trials with respect to the question of Mitchell's prior conviction and his sanity. The jury found true the allegation that Mitchell had been previously convicted of assault with a deadly

weapon, and also found that Mitchell was legally sane at the time he committed the offenses in the current case.⁵

The trial court sentenced Mitchell to the upper term of four years, doubled to eight pursuant to the strike prior, on count 2. The court imposed but stayed (pursuant to § 654) an upper term of six years on count 1, plus a one-year term for the deadly weapon enhancement. With respect to count 3, the court sentenced Mitchell to 365 days in local custody, to be served consecutive to his sentence on count 2. The court imposed an additional consecutive five-year term for the serious felony prior conviction, and imposed but stayed a one-year term for the prison prior.

Mitchell filed a timely notice of appeal.

III.

DISCUSSION

A. *The record demonstrates that Mitchell knowingly and intelligently waived his right to be represented by counsel*

Mitchell contends that the trial court record does not demonstrate that he knowingly and intelligently waived his Sixth Amendment right to be represented by counsel. Specifically, Mitchell argues that the fact that he did not initial any of the boxes on the second page of a form titled "Acknowledgement Concerning Right of Self Representation," and the trial court's failure to fill in "a space [where] the trial court [was] to fill in . . . the defendant's psychiatric history if the defendant appeared to suffer from

⁵ The trial court subsequently determined that Mitchell's prior conviction qualified as a prison prior (§§ 667.5, subd. (b) & 668), a serious felony (§§ 667, subd. (a)(1), 668 & 1192.7), and a strike prior (§§ 667, subds. (b)-(i), 1170.12 & 668).

mental illness," both suggest that the trial court did not fully or adequately advise Mitchell of the risks of self-representation. Mitchell uses such words as "perfunctorily" and "briefly" to describe the trial court's discussions with him concerning self-representation.

1. *Additional background related to the warnings and advisements that the court provided to Mitchell regarding his decision to represent himself*

On March 21, 2008, the date on which Mitchell waived his right to counsel in court, he completed a form entitled, "Acknowledgment Concerning Right of Self-Representation." The form stated that the signatory "acknowledge[d] inquiry and receipt of advice concerning the above [advisements]." Mitchell initialed boxes next to statements that advised him of the charged offenses and his potential sentence.⁶ Mitchell also initialed boxes next to statements acknowledging that the court would not grant him any special treatment; that he would be required to follow the rules governing motions, objections, and the presentation of evidence; that he would be held to the standard of an attorney; that the court would not help him; that the prosecution would be represented by a skilled lawyer; that the prosecutor would not "go eas[y]" on him; that he would get no additional library privileges; that he would get no extra time to prepare; and that he had a right to testify at trial.

⁶ The form incorrectly listed Mitchell's potential sentence as 13 years, when in fact he was facing a possible 14-year sentence. However, Mitchell does not suggest that if he had been advised that the potential sentence was 14 years, rather than 13 years, he would not have waived his right to the assistance of counsel.

Mitchell did not place his initials in any of the boxes next to the advisements on the second page of the form. The boxes that are not initialed are those next to advisements concerning the fact that disruptive behavior would cause the judge to terminate the self-representation, that if Mitchell elected to represent himself, he could not raise a claim of ineffective assistance of counsel on appeal, and that self-representation is almost always unwise and could be harmful to the defendant. Although Mitchell did not initial the boxes next to these advisements, he signed and dated the form just below these three boxes, acknowledging that he had received all of the "above" advisements.

At the hearing regarding Mitchell's waiver of his right to counsel, Judge Jeffrey Fraser asked Mitchell about his educational background. Mitchell informed the court that he had completed a year of college, but had not earned a degree. Mitchell also said that he had represented himself in a prior case. Judge Fraser told Mitchell that the prosecutor in his case had been to law school and would know the Penal Code and Evidence Code. Mitchell responded that he understood the sections of the Penal Code under which he was being charged, and said that he "kn[ew] enough . . . to represent [him]self."

Judge Fraser told Mitchell, "You have the right to represent yourself. But just because you have that right doesn't make it a good idea. In fact, it is probably a very bad idea. Do you understand that?" Mitchell responded in the affirmative. The judge also confirmed with Mitchell that Mitchell understood that he would be held to the level of a lawyer, and that he would be expected to make proper objections and do things as a lawyer would do them. After reaffirming these advisements, Judge Fraser found that

Mitchell had knowingly and intelligently waived his right to counsel, and granted Mitchell's request to proceed in the matter in *propria persona*.

At a February 23, 2009 status conference, Judge Frederick Maguire inquired of Mitchell concerning his desire to represent himself. Mitchell confirmed that he wanted to represent himself. Judge Maguire stated, "We'll show that the [public defender's] office is relieved. You continue to want to represent yourself; there is no need to impose counsel upon you. [¶] If you were not competent, you would need counsel."

At a status conference on June 22, 2009, Judge Robert Trentacosta again raised with Mitchell the potential problems associated with representing himself:

"You are not trained as an attorney. You are going to be going up against a very experienced attorney. And, frankly, this case may have some complexities that would indicate that an attorney should be representing you as opposed to you representing yourself. [¶] You have the right to represent yourself. I'm not going to force . . . an attorney [on you], but I want you to know that I am certainly willing today to appoint you an attorney to help you prepare these motions. They will be your attorney of record, but they will be the ones who will be filing the motions and arguing the motions."

Mitchell again declined the court's offer to appoint counsel and reiterated his desire to represent himself.

At a subsequent status conference on September 1, 2009, Judge Michael Wellington again raised the issue of appointing counsel for Mitchell, asking, "Sure you want to be *pro per* on this case?" Mitchell responded, "Yes. Your Honor." Judge Wellington followed up, "I don't know what the evidence is in this case yet—I haven't gotten into it far enough to have an opinion on that—but if you get to a not guilty by

reason of insanity phase, that's one of the trickiest things for an attorney—a trained, experienced attorney to do. You would be essentially trying to persuade a jury who just saw you do your trial that you were crazy and shouldn't be held responsible for your actions." Mitchell said, "I'm aware, Your Honor." After some more discussion of the matter, the judge said, "I'm just—out of concern for your well-being, I'm asking you again do you really want to take on this very difficult job with your life at stake?" Mitchell replied, "Yes, sir, Your Honor."

The following day at another status conference, Judge Wellington again raised the issue of Mitchell's self-representation, asking Mitchell, "[D]o I correctly understand that you don't want to have an attorney conduct your trial for you?" Mitchell responded, "Correct." Later, the judge stated, "There's no question in my mind this defendant is competent to waive an attorney. He knows what it means. He knows why he wants to do it. No question in my mind that he's competent to waive or assert a variety of rights here. The question I have under *Indiana v. Edwards*^[7] is whether we can have any confidence in a fair trial if he's left to do the very difficult, complex task of presenting the case." Judge Wellington ordered an *Edwards* hearing and ordered additional evaluations of Mitchell.

On October 2, 2009, Judge Wellington held an *Edwards* hearing. At that hearing, the judge asked Mitchell, "I take it you wish to continue as pro per; is that right?" Mitchell repeated that it was his desire to represent himself. Judge Wellington stated on

⁷ *Edwards, supra*, 554 U.S. 164.

the record at that hearing, "[F]rankly, I at this point am expecting that I will not be relieving Mr. Mitchell from his pro per status based on Dr. Neimark's report. It appears to be there's no basis for me to have that doubt in his capacity to represent himself. And whether it's a good idea or not, I constitutionally have to leave that to Mr. Mitchell." Later, the judge stated, "[H]aving read the report from Dr. Naimark I am left persuaded that if he chooses to [represent himself], he can." Judge Wellington proceeded to read some of the findings from the report, including the following:

"It is certainly possible the defendant may have been overtly psychotic in the past when he was utilizing drugs or alcohol, but he does not appear to be psychotic now. As noted, the defendant's thought process is logical, linear, and goal directed. His thought content, while notable for grandiose and narcissistic ideation is not delusional. There is no evidence of cognitive impairment that would impact the defendant's ability to understand the nature of the criminal proceedings, and the defendant's description of the legal proceedings certainly indicates that he intelligently understands what's going on in this case."

At an October 2009 status conference before Judge Kerry Wells, the judge warned Mitchell that he would be held to the standards of an attorney in representing himself, and reminded Mitchell that he had been advised of the risks and dangers of self-representation. After being told that he would be held to the standards of a lawyer, Mitchell responded, "That's fine."

After the guilt phase of the trial, and the subsequent jury trial on the question of Mitchell's sanity and prior conviction, Mitchell asked Judge Wells to appoint counsel for purposes of sentencing. Judge Wells granted Mitchell's request, terminated Mitchell's pro per status, and appointed the public defender to represent Mitchell.

2. *Analysis*

In *Faretta v. California* (1975) 422 U.S. 806, the United State Supreme Court held that a defendant in a state criminal trial has a constitutional right to represent himself under the Sixth and Fourteenth Amendments if he voluntarily and intelligently chooses to do so. (*Id.* at p. 838.) A request for self-representation must be granted if the defendant is mentally competent, the request is knowingly and intelligently made after being apprised of the dangers of self-representation, the request is unequivocal and the request is made within a reasonable time before trial. (*People v. Welch* (1999) 20 Cal.4th 701, 729.)

" 'When confronted with a request' for self-representation, 'a trial court must make the defendant "aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' " [Citation.] . . . ' [Citation.]" (*People v. Stanley* (2006) 39 Cal.4th 913, 932.) In *People v. Lopez* (1977) 71 Cal.App.3d 568, 571 (*Lopez*), the court suggested a set of advisements "designed to ensure a clear record of a defendant's knowing and voluntary waiver of counsel." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1070.) "First, the court recommended the defendant be cautioned (a) that self-representation is 'almost always unwise,' and the defendant may conduct a defense ' "ultimately to his own detriment" ' [citation]; (b) that the defendant will receive no special indulgence by the court and is required to follow all the technical rules of substantive law, criminal procedure and evidence in making motions and objections, presenting evidence and argument, and conducting voir dire; (c) that the prosecution will be represented by a trained professional

who will give the defendant no quarter on account of his lack of skill and experience; and (d) that the defendant will receive no more library privileges than those available to any other self-represented defendant, or any additional time to prepare. Second, the *Lopez* court recommended that trial judges inquire into the defendant's education and familiarity with legal procedures, suggesting a psychiatric examination in questionable cases." (*Koontz, supra*, at pp. 1070–1071.)

The *Lopez* court also suggested that the trial court inquire whether the defendant understands his right to court-appointed counsel, and that the court "explor[e]" the "nature of the proceedings," including the potential defenses and potential punishments, with the defendant. (*Lopez, supra*, 71 Cal.App.3d at p. 573.) Finally, the *Lopez* court noted that the defendant should be made aware that misbehavior or disruption could result in termination of his self-representation and that "in spite of his best (or worst) efforts, he cannot afterwards claim inadequacy of representation." (*Id.* at p. 574.)

Although there are standard scripts that trial judges often use in advising defendants of the risks and consequences of self-representation, " '[n]o particular form of words . . . is required in admonishing a defendant who seeks to forgo the right to counsel and engage in self-representation.' " (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 546 (*Sullivan*).) " ' "The test of a valid waiver of counsel is not whether specific warnings or advisements were given but whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case.' " [Citation.]' [Citation.] If the trial court's warnings communicate powerfully to the defendant the 'disadvantages of proceeding pro se,' that is

all '*Faretta* requires.' [Citation.] [A court's] waiver inquiry 'must be pragmatic,' and focused upon 'the status of the defendant's knowledge and understanding at the time of the purported waiver.' [Citation.] 'The requirement is met if the record establishes the defendant is literate and understanding and has voluntarily exercised the choice of representing himself.' [Citation.] The 'information a defendant must have to waive counsel intelligently will "depend, in each case, upon the particular facts and circumstances surrounding that case" [citation].' [Citation.]" (*Ibid.*)

" 'A defendant may challenge the grant of a motion for self-representation on the basis the record fails to show the defendant was made aware of the risks of self-representation.' [Citation.] ' "Whether there has been a waiver is a question of fact." [Citation.]' [Citations.] 'The burden is on the defendant to demonstrate he did not knowingly and intelligently waive his right to counsel.' [Citations.] On appeal, the courts 'review the entire record—including proceedings after the purported invocation of the right of self-representation—and determine de novo whether the defendant's invocation was knowing and voluntary. [Citations.] Even when the trial court has failed to conduct a full and complete inquiry regarding a defendant's assertion of the right of self-representation, these courts examine the entire record to determine whether the invocation of the right of self-representation and waiver of the right to counsel was knowing and voluntary.' [Citations.]" (*Sullivan, supra*, 151 Cal.App.4th at pp. 546-547.)

Mitchell complains that he did not knowingly and intelligently waive his right to be represented by counsel, noting that he "did not initial the boxes on the second page of the ['Acknowledgement Concerning Right of Self Representation'] form," and that those

"un[]initialed boxes were intended to show that appellant had been advised, and understood, that if he disrupted the proceedings he would lose his right of self-representation, that by representing himself he could not later make a claim of ineffective assistance of counsel, and that the court had warned him that self-representation is almost always unwise." Mitchell also asserts that the "trial court only perfunctorily asked appellant about his level of education and about his knowledge of the charges," and "only briefly told appellant that self-representation was not a good idea." Mitchell further contends that throughout the extenuated proceedings, and after an arraignment on an amended complaint that added a new enhancement allegation, the court "did not conduct any other hearings to determine if appellant's waiver of counsel was knowing and voluntary."

Viewed in its entirety, the record demonstrates that Mitchell was made aware of the risks and dangers of representing himself, and that he knowingly and voluntarily waived his right to counsel despite having been warned of these risks and dangers. Throughout the proceedings in the trial court, the various judges who presided over those proceedings repeatedly inquired of Mitchell whether he continued to wish to represent himself, and repeatedly warned Mitchell of the risks of representing himself. In particular, Judge Wellington advised Mitchell that this case could raise complex issues due to Mitchell's raising an insanity defense. Other judges made similar comments. Despite the repeated admonitions, Mitchell indicated over and over that it was his wish to waive his right to be represented by counsel. There is simply nothing in the record that would suggest that his waiver was not made knowingly and voluntarily. Mitchell had

previously represented himself in another matter and had been successful; all indications are that he believed he could do a better job than a public defender in defending himself in this matter. In sum, the record demonstrates that Mitchell's waiver of the right to counsel was made knowingly and voluntarily.

B. *The trial court did not violate Mitchell's right to a fair trial and/or his right to due process of law by denying Mitchell's request to appoint advisory counsel*

Mitchell contends, in the alternative, that even if the trial court correctly determined that he effectively waived his right to be represented by an attorney at trial, the court nevertheless denied him a fair trial by denying his requests to appoint advisory counsel.

1. *Additional background*

At a status conference held on February 3, 2009, Mitchell requested a continuance so that he could pursue further discovery. At that time, Mitchell also requested that the trial court appoint advisory counsel to assist him. Mitchell stated that he was requesting advisory counsel "due to the fact that the opinion has to be ad seq.," because his "access to the law library [was] limited," and also because he believed "it would relieve the court of any undue or unnecessary troubles and hassles that might occur with me in not knowing the exact specific procedures." After making this request, Mitchell proceeded to discuss a number of other matters. Judge Danielsen appeared to be concerned with Mitchell's competency at that point in time, and inquired about Mitchell's mental state. After some discussion, Judge Danielsen asked Mitchell, "So what motions are you . . . bringing today?" In responding, Mitchell identified a number of requests,

including a request for a continuance, but did not again raise the issue of advisory counsel. At the conclusion of this status conference, Judge Danielsén suspended the criminal proceedings for a determination of Mitchell's competence, without taking any action with respect to Mitchell's request for advisory counsel.

A few months later, at a June 2009 status conference before Judge Robert Trentacosta, Mitchell requested a continuance and again requested that the court appoint advisory counsel, saying:

"There's so much groundwork that I have to do and lay. I had originally requested the preliminary—and I filed a motion with leave to amend with a six-month extension on the motion cutoff date because the defendant is physically incapable. I have to acquire the information that I need to file my motions as well as research the case law.

"[¶] . . . [¶]

" . . . I have limited capabilities, which is why I was requesting an advisory counsel, Your Honor, to help speed up the process and to make it easier for the court as well as the defendant."

Judge Trentacosta responded, "What I do in these cases—you have elected to go pro per." Mitchell stated, "Yes, sir." Judge Trentacosta then said, "So I'm not going to appoint advisory counsel in this case. I'd be happy to appoint court-appointed counsel if you want. I'll let you think about that." When Mitchell then complained about the attorney who had previously been appointed to represent him, and that attorney's decision not to "file any motions," the judge responded, "That doesn't mean, Mr. Mitchell, that other counsel wouldn't see the case differently and do things differently." Judge Trentacosta warned Mitchell that his case was complex and that he would be going up

against a very experienced attorney. The judge offered to appoint counsel to represent Mitchell, but Mitchell declined the offer.

At a hearing on September 1, 2009, Mitchell informed Judge Wellington, "I'm going to need a cart or something to bring my—my stuff that I prepared. Because of the chains, I can't—I'm cross-chained." Mitchell then discussed with the court whether he would really need to bring any files to the courthouse the following day. Judge Wellington told Mitchell, "Tomorrow, I'm going to try to get to the very fundamental things that I don't think you'll need the extra files for." Mitchell replied, "The defendant would be more than willing to accept advisory counsel, Your Honor." Judge Wellington responded, "I know that, and that was addressed and ruled on previously."

2. *Analysis*

Once a defendant elects self-representation, he does not have a constitutional right to advisory counsel to assist with his defense. (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 183–184; *People v. Bloom* (1989) 48 Cal.3d 1194, 1218.) "[C]ocounsel status, advisory counsel and other forms of 'hybrid' representation are not constitutionally guaranteed." (*People v. Clark* (1992) 3 Cal.4th 41, 111 (*Clark*).) " '[T]he powers and responsibilities which attend the representation of a criminally accused person should never be conferred jointly and equally on the accused and the attorney.' " (*People v. Stewart* (2004) 33 Cal.4th 425, 518 (*Stewart*), citing *People v. Bloom*, *supra*, at pp. 1218–1219.) " 'Rather, in all cases of shared or divided representation, either the accused or the attorney must be in charge. Stated otherwise, at all times the record should be clear that the accused is either self-represented or represented by counsel; the accused cannot be

both at once [A] self-represented defendant who wishes to obtain the assistance of an attorney in an advisory or other limited capacity, but without surrendering effective control over [the] presentation of the defense case, may do so only with the court's permission and upon a proper showing.' [Citation.]" (*Stewart, supra*, at p. 518, quoting *People v. Bloom, supra*, at p. 1219.)

If the right of self-representation has been granted to a defendant, the trial court "may, in its discretion, appoint counsel to 'render . . . advisory services' to a defendant who wishes to represent himself, in order to promote orderly, prompt and just disposition of the cause." (*People v. Garcia* (2000) 78 Cal.App.4th 1422, 1430.) It is clear that with this discretion, the court may " 'deny as well as . . . grant' " a motion for advisory counsel. (*People v. Walton* (1996) 42 Cal.App.4th 1004, 1018, disapproved of on another ground in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3, quoting *People v. Crandell* (1988) 46 Cal.3d 833, 863.) "[A]s with other matters requiring the exercise of discretion, 'as long as there exists a reasonable or even fairly debatable justification, under the law, for the action taken, such action will not be here set aside [Citations.]" [Citation.]" (*Clark, supra*, 3 Cal.4th 41, 111.)

We perceive no abuse of discretion in the trial court's refusal to appoint advisory counsel to assist Mitchell on any of the occasions on which Mitchell raised the issue. As noted, Mitchell was familiar with the justice system, having acted as his own attorney, successfully, in at least one prior case. In addition, Mitchell demonstrated the ability to competently act as his own attorney during pretrial proceedings, and in his discussions with the trial court throughout the proceedings. He understood how to engage in

discovery and how to request the ancillary legal services to which he was entitled, and in fact made a number of requests of the court and the prosecutor. In light of Mitchell's level of intelligence, demonstrated by his interactions with the court throughout the proceedings, as well as his demonstrated legal capabilities, the trial court had, at a minimum, a "fairly debatable justification" (*Crandell, supra*, 46 Cal.3d at p. 863) for denying Mitchell's request for the appointment of advisory counsel to assist him.

Further, the reasons that Mitchell proffered for why he needed the assistance of advisory counsel were circumstances that were directly related to his choice to represent himself. For example, Mitchell offered that advisory counsel would help the court avoid "unnecessary troubles and hassles" that might arise because of Mitchell's unfamiliarity with court procedures. He also raised the issue of the appointment of advisory counsel in the context of expressing his desire to have assistance in transporting his files to court. In addition, Mitchell mentioned that he had "limited capabilities" and that there was "so much groundwork that [he] ha[d] to do and lay," including "acquir[ing] the information that [he] need[ed] to file [his] motions as well as research the case law." Each of the problems that Mitchell raised stemmed from his choice to represent himself; the trial court was not required to appoint advisory counsel on any of these grounds.

Finally, the gist of Mitchell's arguments with respect to why he believes the trial court's denial of his request for advisory counsel was an abuse of discretion centers around the fact that the court determined twice during the course of the proceedings in the trial court that Mitchell was incompetent to stand trial. Mitchell appears to be implying on appeal that due to his mental state, he did not have the mental capability to

adequately defend himself, and, therefore, the trial court should have appointed advisory counsel to assist him. For example, Mitchell argues that the "mental competency proceedings interrupted and delayed the proceedings, caused appellant to lose his discovery and legal research, caused the trial court to have to reappoint the OAC to provide legal assistance and investigative services for appellant, and interfered with appellant's ability to defend himself." He further complains that "[a] psychiatrist had previously found that appellant was 'not capable of representing himself in a rational manner,' " and that the "trial judge previously concluded that appellant's thought processes were disorganized and pressured." Based on these contentions, and the fact that the "record of appellant's written motions reflect this mental disorganization," Mitchell argues that the trial court abused its discretion in denying his request for advisory counsel.

Even given this unique record, we cannot conclude that the trial court abused its discretion in declining to appoint advisory counsel to assist Mitchell. Although there were various time periods during which Mitchell's competency to stand trial was in question and during which the court stayed the proceedings, Mitchell was ultimately found competent to stand trial, and was also specifically found competent to represent himself (see *Edwards, supra*, 554 U.S. 164 [state courts may impose a higher standard of mental competence of self-representation than for trial with counsel if they choose]; see also *People v. Johnson* (Jan. 30, 2012, S188619) __ Cal.4th __ [California courts may deny self-representation when *Edwards* permits such denial]). The court was clearly concerned about Mitchell's competency at various points in time. However, each time

Mitchell's competency was in question, the court ultimately found that Mitchell was competent to stand trial, and therefore, that he was competent to represent himself. These competency findings were supported by psychological evaluations by experts. Mitchell's suggestion on appeal that the court should have granted his request for advisory counsel due to his mental issues appears to be a claim that he was not *sufficiently* competent to represent himself without additional assistance. We find no support for this claim in the record. Nor have we found any authority that would suggest that where a defendant has, at one point, been determined to be incompetent to stand trial, but is later found competent not only to stand trial, but also to represent himself, a reviewing court must nevertheless conclude that the trial court abused its discretion in refusing the defendant's request to appoint advisory counsel where it turns out that the defendant did a poor job in representing himself.

C. *The trial court should have stricken the one-year enhancement term for Mitchell's prior prison offense*

Mitchell contends that the trial court erred in staying, rather than striking, the one-year term for the prison prior enhancement, imposed pursuant to section 667.5, subdivision (b), because the court had already imposed a five-year term, pursuant to section 667, subdivision (a)(1), based on the same prior offense. The People concede that the trial court relied on the same prior offense to impose both enhancement terms, and that under *People v. Jones* (1993) 5 Cal.4th 1142, the trial court may not impose a sentence for both of these enhancements when they are based on the same prior offense.

The People urge this court to order that the one-year enhancement term that the trial court imposed and stayed be stricken.

We accept the People's concession and order the judgment modified to strike the one-year prison prior term imposed and stayed pursuant to section 667.5, subdivision (b).

IV.

DISPOSITION

The one-year prison prior term imposed pursuant to Penal Code section 667.5, subdivision (b) is stricken. The judgment is modified to reflect this striking. In all other respects, we affirm the judgment. The trial court shall prepare an amended abstract of judgment reflecting this modification, and shall forward the amended abstract of judgment to the California Department of Corrections and Rehabilitation.

AARON, J.

WE CONCUR:

HALLER, Acting P. J.

IRION, J.